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Supreme Court of the United States

October Term, 1972

SUPREME COURT, U. S.
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No. 72-169

WILLIAM STEVEN COOK, PETITIONER

versus

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

(14982)

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FOR THE FOURTH CIRCUIT

The petitioner prays that a writ of *certiorari* issue to review that portion of the judgment of the United States Court of Appeals for the Fourth Circuit, *en banc,* entered in this proceeding on May 8, 1972, which affirms by an equally divided court the district court's ruling that the petitioners were not twice placed in jeopardy by a trial held after the direction of a mistrial during the course of an earlier trial.

OPINIONS BELOW

The first opinion of the United States Court of Appeals for the Fourth Circuit is reported *sub nom. United States v. Walden,* 448 F.2d 925 (4th Cir. 1971), and appears as Appendix A hereto. The judgment of the court of appeals

rendered upon reconsideration on May 8, 1972, *en banc*, not yet reported, appears as Appendix B hereto. The judgment of the United States Court of Appeals for the Fourth Circuit after remand to the original panel rendered on July 20, 1972, not yet reported, appears as Appendix C hereto. Petitioner is preparing a petition for rehearing in the United States Court of Appeals for the Fourth Circuit. The decision of the district court, rendered verbally in open court, appears as Appendix D hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit on reconsideration *en banc* was entered on May 8, 1972. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and Rule 20 of the Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

1. Was there manifest necessity for the trial judge, on his own motion, to declare a mistrial over petitioner's specific objection, and declaration that he was in jeopardy and could not be tried a second time if his right to have the first trial completed was disregarded?

2. Did the United States Court of Appeals for the Fourth Circuit order the wrong result when it affirmed the district court after dividing equally on rehearing *en banc* when its original panel had reversed the district court?

CONSTITUTIONAL PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment

or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

In the court below petitioner was one of ten appellants. Ten of eleven original defendants charged with substantive offenses and conspiracy to burglarize numerous banks in various Southeastern states appealed. There had been two trials. The first was aborted by a mistrial declaration. The second resulted in jury verdicts of guilty. The appeals were based on various grounds including the claim that the first trial was unnecessarily aborted and the second trial constituted double jeopardy in violation of the Fifth Amendment. The United States Court of Appeals for the Fourth Circuit originally reversed under *United States v. Jorn,* 400 U. S. 470 (1971), holding that retrial had constituted double jeopardy; *United States v. Walden,* 448 F.2d 925 (4th Cir. 1971), but on rehearing *en banc* that decision was reversed by an equally divided court (Appendix B).

The mistrial situation arose in the district court in the following manner. After returning from a lunch recess on the third day of the first trial, the trial judge said:

> "Gentlemen, the United States Marshal has called to my attention that during the lunch hour, we sent the jury out, and then as they were taking the jury to lunch two of the jurors inadvertently remained in the Jury Room or in the rest room or rest rooms. I don't know all the details, but that is not necessary. When

> the Marshal discovered it and went back upstairs to get them, they were at the door; there were also at the door in the hallway in their presence the various defendants who at the time were in custody, and I assume some if not all of them were in handcuffs."

The judge referred to the decision of the United States Court of Appeals for the Fourth Circuit in *Holmes v. United States*, 284 F.2d 716 (4th Cir. 1960), as controlling under the circumstances and suggested that the defendants and their counsel consider a mistrial motion.

Counsel for the defendants made various requests to have the events surrounding the supposed prejudicial event clarified and also requested consideration of alternative curative measures. The court declined further investigation into the event and rejected other possible curative procedures.[1]

Despite the intimation that the rest of the jury had no actual knowledge of what had transpired, the suggestion by defense counsel that the two viewing jurors be removed replacing them with two alternates sitting with the jury was not accepted, and after a fifteen minute recess, counsel for four defendants formally moved for a mistrial. A mistrial as to all defendants was declared. Those who expressed their desire to proceed with the trial moved to sever. Basing his decision on the contention by the govern-

---

[1] Mr. PORTER: Your Honor, could we have the names of the [two] Jurors?

The COURT: I don't know the names.

Mr. GLENN: I don't know if the Marshal knows the names or not, but it would have a bearing on whether I would make such a motion.

* * *

Mr. GLENN: What I am thinking about is whether or not the rest of the jury has now had the knowledge that those two jurors have.

* * *

Mr. GADDY: The only information, Your Honor, that the rest of the jurors have is that the other two were left. (*That is the only information they have.* (emphasis added).

* * *

ment that separate trials would be "impractical" the court denied the motion.

Even after the judge announced this intention to abort, counsel for the defendants continued to press the court to consider dismissing the two viewing jurors and continuing with the remaining twelve. Moreover, counsel for petitioner specifically advised the court that petitioner's position was that a mistrial declaration would bar a subsequent trial under the double jeopardy clause.[2]

REASONS FOR GRANTING THE WRIT

1. a. The court below refused to follow this Court's decision in United States v. Jorn, 400 U. S. 470 (1971).

The decision of the court below is in conflict with *United States v. Jorn*, 400 U. S. 470 (1971). In *Jorn* the Court reaffirmed the rule enunciated in *United States v. Perez*, 22 U. S. (9 Wheat) 579 (1824), that a mistrial may be ordered without the defendant's consent only where there is a "manifest necessity". Otherwise, a second trial for the same offense will be barred by the double jeopardy provision of the Fifth Amendment. The manifest necessity doctrine was defined as a power " . . . to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes . . . ." *Perez*, 22 U.S. 579, 580.

---

[1] Mr. DIBBLE: Would there be a possibility if we had a conference . . . to confer with the two, or ask them questions?

The COURT: No. There is one thing that I don't do and that is have any talk with the juror . . . Nobody should talk to a juror before, during or after a trial about anything, and I don't ever do it unless it is of such gravity that I can't help it . . .

Mr. DIBBLE: My only question is that we have two alternates. If we find that they have said nothing, I thought we might have a possibility of taking them off.

[2] Mr. GLENN: Your Honor, I don't think I could serve the court without telling the court that the reason we have taken the position we have, I can't cite the court the case, but our understanding of the law is that when a conspiracy trial is in progress, and a mistrial occurs, and one of the defendants does not join in that motion for a mistrial, and the court doesn't grant it, I mean the court forced him into a mistrial, and he is then brought back to trial again, that that is double jeopardy. I can't cite you the case, but that is my understanding.

In *Jorn*, the Court required a "scrupulous exercise of judicial discretion" by the trial judge. *Jorn, supra*, p. 485.

In discussing the development and application of the manifest necessity doctrine in *Jorn*, the Court reviewed the decision of *Gori v. United States*, 367 U.S. 364 (1961), wherein the Court appeared to tie the judgment that there was no abuse of discretion in the declaration of a mistrial, under those circumstances, to the fact that the trial judge acted in the sole interest of the defendant. The Court in *Jorn* noted that it was unable to conclude on the record that it was a case of a mistrial made in the sole interest of defendant and went on to say:

> "Further, we think that a limitation on the abuse of discretion principle based on an appellate court's assessment of which side benefited from the mistrial ruling does not adequately satisfy the policies underpinning the double jeopardy provision. Reprosecution after a mistrial has unnecessarily been declared by the trial Court obviously subjects the defendant to the same personal strain and insecurity regardless of the motivation underlying the trial judge's action. . . . " *Jorn*, 400 U. S. 483.

At the time this case was heard on appeal, the *Jorn* decision had been rendered. *Jorn* was applied on review by the original panel in the court below of the trial judge's action in declaring the mistrial. Nothing appears in the court's *en banc* judgment indicating the basis of its decision.

The first decision of the panel correctly applied *Jorn* and interpreted it as barring the second trial under the facts of this case. The record revealed to the panel that there was no scrupulous exercise of judicial discretion by the trial judge in aborting the first trial and that no manifest necessity existed for aborting the trial. Only two of fourteen jurors (twelve jurors and two alternates) saw

the defendants in custody and possibly in handcuffs, and the trial court was advised by the Deputy United States Marshal that the remaining twelve jurors knew only that "the other two [jurors] were left [behind]," as the jury went to lunch. The opinion noted that the suggestion of defense counsel that the two jurors be removed and replaced with the two alternates was not accepted by the trial judge despite the Marshal's unequivocal statement and that the trial judge refused the request of defense counsel to question the two viewing jurors to determine the extent to which the jury panel as a whole was actually contaminated, if at all. The panel therefore held that the trial was aborted without determining the existence of the "urgent circumstances" and "plain and obvious causes" mentioned in *Perez*. In addition, the opinion pointed out that the trial judge failed to explore the possibility of a curative instruction, despite the relatively trivial nature of the event. The panel found, and petitioner submits, that the trial judge clearly failed to give proper consideration to the importance to the petitioner of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate as required by *Jorn*. Only "imperious necessity" for the mistrial can justify a second trial: Any doubt must be resolved in favor of the liberty of the citizen. *Downum v. United States*, 372 U. S. 734, 737 (1963).

The abuse of discretion by the trial judge in this case is highlighted by petitioner's insistence that his trial be continued despite the event which was supposed to be prejudicial to him. Petitioner moved that his case be tried to conclusion and specifically told the trial court that he would consider it double jeopardy to declare a mistrial and later retry him before another jury. Petitioner's positive assertion of his right to have his trial concluded makes the

declaration of a mistrial for a trivial reason particularly offensive to the policies underlying the double jeopardy provision.

The Fourth Circuit *en banc* should have concluded that this case was controlled by *Jorn* as its original panel did. The Seventh Circuit, in *United States Ex Rel. Somerville v. State of Illinois*, 447 F.2d 733 (7th Cir. 1971), following remand from this Court, 401 U. S. 1007 (1971), applied *Jorn* to hold that an accused could not be retried after his first trial was mistried on the prosecution's motion, for the supposed reason that the indictment was defective. The Seventh Circuit originally reached the opposite conclusion, 429 F.2d 1335 (7th Cir. 1970).

1. b. The court below ordered a wrong result by affirming the district court after dividing equally on rehearing *en banc* when the decision of its original panel had reversed the district court.

On rehearing after a judgment of reversal, the equal division of the court will leave the reversal standing. *Best & Co. v. Maxwell*, 217 N. C. 134, 6 S. E. 2d 893 (1940), reversed on other grounds, 311 U. S. 454; *Florida Motor Lines v. Hill*, 106 Fla. 33, 143 So. 261, Annotation 131 A. L. R. 1011, *Effect of Equal Division of Appellate Court upon Rehearing after Reversal;* 5 Am. Jur.2d, *Appeal and Error* § 902.

The Fourth Circuit, by reversing its original panel, directed a result exactly contrary to the above principle. The Second Circuit has apparently taken similar action in *Drake Bakeries, Inc. v. Local 50 American Bakery & C. Wkrs.*, 294 F.2d 399 (2nd Cir. 1961), affirmed without consideration of this point, 370 U. S. 254; *Farrand Optical Co. v. United States*, 317 F.2d 875 (2nd Cir. 1962). This Court has never approved that practice.

CONCLUSION

For these reasons, a writ of *certiorari* should issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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29211.

July, 1972.

APPENDIX

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APPENDIX A

UNITED STATES OF AMERICA, APPELLEE,

versus

BILLY DELANO WALDEN ET AL, APPELLANTS.

Nos. 14974-14983.

UNITED STATES COURT OF APPEALS,
FOURTH CIRCUIT.

Argued June 10, 1971.
Decided September 22, 1971.

Before BOREMAN, BRYAN and CRAVEN, Circuit Judges.

CRAVEN, Circuit Judge:

This is an appeal by ten of eleven [1a] defendants charged with substantive offenses and conspiracy to burglarize numerous banks in various Southeastern states. There have been two trials. The first was aborted by a mistrial declaration. The second resulted in jury verdicts of guilty. The Appeals are based on various grounds including the claim that the first trial was unnecessarily aborted and the second trial constituted double jeopardy in violation of the Fifth Amendment. We agree, and reverse under *United States v. Jorn*, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed2d 543 (1971).

I

After returning from a lunch recess on the third day of the first trial, the trial judge said:

> Gentlemen, the United States Marshal has called to my attention that during the lunch hour, we sent the jury out, and then as they were taking the jury to lunch two of the jurors inadvertently remained in the Jury Room or in the rest room or rest rooms. I don't know

[1a] The eleventh defendant has not appealed. Since our decision with respect to the other defendants proceeds on constitutional grounds, the non-appealing defendant may obtain review of the validity of his conviction by filing a motion under 28 U. S. C. A. § 2255.

> all the details, but that is not necessary. When the Marshal discovered it and went back upstairs to get them, they were at the door; there were also at the door in the hallway in their presence the various defendants who at the time were in custody, and I assume some if not all of them were in handcuffs.

The judge referred to our decision in *Holmes v. United States*, 284 F.2d 716 (4th Cir. 1960),[1] as controlling under the circumstances and suggested that the defendants and their counsel consider a mistrial motion.

Counsel for the defendants made various requests to have the events surrounding the supposed prejudicial event clarified and also requested consideration of alternative curative measures. The court declined further investigation into the event and rejected other possible curative procedures.[2]

---

[1] The following is a *precis* of *Holmes:*

> Despite the careful instruction they had received, one of the feminine members of the jury, during lunch immediately after submission of the case and just before the jurors commenced their deliberations, inquired of one of the deputy marshals in charge of the jury, or generally of those in her hearing, "I wonder where the defendants are staying?" To this the deputy marshal responded, in effect, that he did not know where Holmes was staying, but he knew that Bedami [the other defendant] was staying in the Lexington county jail serving a 6-year sentence. * * *
>
> It is clear that the deputy marshal improperly communicated information to members of the jury which, alone or in combination with newspaper articles they had read, informed them of the prior conviction.
>
> The judge would not have permitted reference in open court to such a conviction. * * *
>
> We think this improper communication by a court official to members of the jury required an order granting a new trial.

Holmes v. United States, 284 F.2d 716, 718-719 (4th Cir. 1960).

[2] Mr. PORTER: Your Honor, could we have the names of the [two] jurors?

The COURT: I don't know the names.

Mr. GLENN: I don't know if the Marshal knows the name or not, but it would have a bearing on whether I would make such a motion.

* * *

Mr. GLENN: What I am thinking about is whether or nor the rest of the jury has now had the knowledge that those two jurors have.

* * *

Mr. GADDY: The only information, Your Honor, that the rest of the jurors have is that the other two were left, *That is the only information they have.* (Emphasis added.)

* * *

Despite the intimation that the rest of the jury had no actual knowledge of what had transpired, the suggestion by defense counsel Dibble that the two viewing jurors be removed replacing them with two alternates sitting with the jury was not accepted, and after a fifteen minutes recess, counsel for four defendants—Ard, Walden, Damour and Hogan—formally moved for a mistrial. A mistrial as to all defendants was declared. Those who expressed their desire to proceed with the trial moved to sever. Basing his decision, it seems, on the contention by the government that separate trials would be "impractical," the court denied the motion.

Even after the judge announced this intention to abort, at least one of the counsel for the defendants continued to press the court to consider dismissing the two viewing jurors and continuing with the remaining twelve.[3] Moreover, counsel candidly advised the court that defendants' position at least as to the six who desired to proceed, was that a mistrial declaration would bar a subsequent trial under the double jeopardy clause.[4]

Mr. DIBBLE: Would there be a possibility if we had a conference * * * to confer with the two, or ask them questions?

The COURT: No. There is one thing that I don't do and that is have any talk with a juror. * * * Nobody should talk to a juror before, during, or after a trial about anything, and I don't ever do it unless it is of such gravity that I can't help it. * * *

Mr. DIBBLE: My only question is that we have two alternates. If we find they have said nothing, I thought we might have a possibility of taking them off.

[3] Mr. KING: May I inquire of the court if Your Honor has contemplated the substitution of the two alternates?

The COURT: I considered every possibility. It would be difficult for me to make a determination that there has not been a contamination of the entire jury, if there has been a contamination by this particular confrontation which the United States Court of Appeals for the Fourth Circuit has said is not a harmless error.

[4] Mr. GLENN: Your Honor, I don't think I could serve the court without telling the court that the reason we have taken the position we have, I can't cite the court the case, but our understanding of the law is that when a conspiracy trial is in progress, and a mistrial occurs, and one of the defendants does not join in that motion for a mistrial, and the court doesn't grant it. I mean the court forced him into a mistrial, and he is then brought back to trial again, that that is double jeopardy. I can't cite you the case, but that is my understanding.

II

[1] Over 140 years ago, Mr. Justice Story in *United States v. Perez,* 22 U.S. (9 Wheat.) 579, 6 L.Ed. 165 (1824), formulated what has continued to be the standard in cases such as this one: that the double jeopardy clause of the Fifth Amendment prohibits a second trial after a first trial has been aborted without the defendant's consent, unless there was "manifest necessity" for doing so.

> We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with greatest caution, under urgent circumstances, and for very plain and obvious causes. * * *

22 U.S. (9 Wheat.) at 580, 6 L.Ed. 165.

Refusing to read the double jeopardy clause as an absolute bar to second trials, the "defendant's valued right to have his trial completed by a particular tribunal" is instead balanced against "the public's interest in fair trials designed to end in just judgments." *Wade v. Hunter,* 336 U.S. 684, 689, 69 S.Ct. 834, 837, 93 L.Ed. 974 (1949).[5] The mandate to trial judges under the Fifth Amendment is easy to state, but difficult to apply: he must not "foreclose the defendant's option [to have his trial completed by a par-

[5] Thus, reprosecution is not barred after a conviction is reversed on appeal, *United States v. Ball,* 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896), or on collateral attack, *United States v. Tateo,* 377 U.E. 463, 84 S.Ct. 1587, 12 L.Ed.2d 448 (1964). Mistrial declarations do not bar reprosecution when the jury is dismissed because they can not reach a verdict, *Logan v. United States,* 144 U.S. 263, 12 S.Ct. 617, 36 L.Ed. 429 (1892); *United States v. Perez,* 22 U.S. (9 Wheat.) 579, 6 L.Ed. 165 (1824); because of the disqualification of a juror, *Thompson v. United States,* 155 U.S. 271, 15 S.Ct. 73, 39 L.Ed. 146 (1894); *Simmons v. United States,* 142 U.S. 148, 12 S.Ct. 171, 35 L.Ed. 968 (1891); or because of tactical necessity in wartime, *Wade v. Hunter,* 336 U.S. 684, 69 S.Ct. 834, 93 L.Ed. 974 (1949).

ticular tribunal] until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." *United States v. Jorn,* 400 U.S. 470, 485, 91 S.Ct. 547, 557, 27 L.Ed.2d 543 (1971).

Jorn is apparently the penultimate if not the end product of a "trend toward reducing the occasions on which criminal defendants may be made to 'run the gantlet twice.'" Note, Double Jeopardy: The Reprosecution Problem, 77 Harv. L. Rev. 1272, 1272 (1964). Although the rubric remains the same, and the Court again declines, as it always has, to formulate rules based on categories of circumstances which will permit or preclude retrial, nevertheless, *Jorn* is, we think, a significant departure from prior controlling case law. We think it controls here and dictates a result we might not otherwise reach. Whether described in terms of "manifest necessity," *Perez, supra,* 22 U.S. (9 Wheat.) at 580, 6 L.Ed. 165, "imperious necessity," *Downum v. United States,* 372 U.S. 734, 736, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963); for "reasons deemed compelling by the trial judge," *Gori v. United States,* 367 U.S. 364, 368, 81 S.Ct. 1523, 1526, 6 L.Ed.2d 901 (1961); or "breakdown in judicial machinery," *id.* at 372, 81 S.Ct. 1523 (Douglas, J., dissenting), unquestionably the trial judge's "sound discretion" to abort a trial has been considerably narrowed.

This trial was commenced on March 23, 1970, and was aborted on March 26, 1970, and the second trial was conducted during May of 1970. Thus the district judge in aborting the first trial and denying the plea of double jeopardy entered at the second trial acted in light of *Gori v. United States,* 367 U.S. 364, 81 S.Ct. 1523, 6 L.Ed.2d 901 (1961); *Downum v. United States,* 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963); and *United States v. Tateo,* 377 U.S. 463, 84 S.Ct. 1587, 12 L.Ed.2d 448 (1964); and without benefit of *Jorn* which was not decided until January 25, 1971. But for *Jorn,* as we have said, we would be inclined to affirm for it is clear to us that the district judge acted out of zealous solicitude for the protection of the rights of the defendants and without the slightest intention to harrass or oppress them. As recently as 1968 we noted

that the discretion of the trial judge to abort a trial "is undoubtedly being narrowed, as a practical matter, by awareness of the closer scrutiny to which the exercise of his discretion is now subjected." *United States v. Smith*, 390 F.2d 420, 423 (4th Cir. 1968). But even then we interpreted *Gori* and *Tateo* to insulate second prosecutions from attack where the first one had been aborted by the trial judge as a matter of fairness to the defendant—even an overly solicitous fairness. Doubtless the district judge here was led by *Gori, Tateo* and our interpretation of them in *Smith* to reasonably believe that so long as he acted out of concern for the best interest of the defendants, and there is no doubt he was genuinely concerned, his abortion of the trial would not constitute an abuse of discretion.

We think that *Jorn* all but eliminates trial judge motivation as an element to be considered in determining whether an aborted trial bars reprosecution. "Reprosecution after a mistrial has unnecessarily been declared by the trial court obviously subjects the defendant to the same personal strain and insecurity regardless of the motivation underlying the trial judge's action." 400 U.S. at 483, 91 S.Ct. at 556. In again expressly declining to formulate "bright line rules," the Court said that such rules "based on either the source of the problem or the intended beneficiary of the ruling would only disserve the vital competing interests of the Government and the defendant." 400 U.S. at 486, 91 S.Ct. at 557.

[2] In light of *Jorn*, we hold with respect to the six defendants who did not move for a mistrial that the double jeopardy clause of the Fifth Amendment barred the second trial, and they are entitled to judgment of acquittal.

The decision to abort was based upon a reading of our decision in *Holmes v. United States*, 284 F.2d 716 (4th Cir. 1960). There we reversed the conviction of two defendants because the jury had been inadvertently informed by a court official of one defendant's past criminal record, information which could not be introduced at trial.[6] Disqualification of a juror has always been viewed as an occurrence

[6] *See* note 1, *supra*.

in which there is manifest necessity in declaring a mistrial. See, *e. g., Thompson v. United States,* 155 U.S. 271, 15 S. Ct. 73, 39 L.Ed. 146 (1894); *Simmons v. United States,* 142 U.S. 148, 12 S.Ct. 171, 35 L.Ed. 968 (1891).

The district judge reasoned that the sight of one or more defendants in handcuffs at a recess would inevitably suggest to the viewing jurors that such a defendant was imprisoned under commitment for some prior crime. Such a misinterpretation of the incident is, of course, possible. But it seems as least equally probable that the witnessing jurors correctly understood the event, and were neither shocked nor surprised nor prejudiced by observing that persons charged with serious crimes are sometimes confined during trial and secured by handcuffs on their way to and from the courtroom rather than left free to come and go as they please. Unfortunately the record does not disclose the impact upon the two jurors. Again out of a sense of scrupulous fairness to defendants the trial judge refused to permit them to be interrogated despite a request that he do so. *Jorn* put upon him a duty to exhaust all other reasonable possibilities before deciding to foreclose defendants' option to proceed. The trial judge must make a "scrupulous exercise of judicial discretion." *Jorn* at 485, 91 S.Ct. 547 The scrupulous exercise of that discretion means that he must seek out and consider all avenues of cure to avoid trial abortion. There was no such "scrupulous" exercise here. One cure, continuing the trial with the twelve remaining jurors, or even an agreement to proceed with fewer than twelve, was not considered in depth, despite defense counsels' suggestions to pursue that course. No effort was made to ascertain whether the other jurors knew of the event, not even by inquiry of the two who might have been tainted. "[T]he power [to abort] ought to be used with greatest caution, under urgent circumstances, and for very plain and obvious causes. * * *" *Perez, supra,* 22 U.S. (9 Wheat.) at 580, 6 L.Ed. 165.

The much harder problem is what to do about the four appealing defendants who did join in the motion to the district court for a mistrial. It "is ordinarily assumed" that a motion by the defendant for mistrial removes any barrier

to reprosecution. *Jorn, supra,* 400 U.S. at 485, 91 S.Ct. 547; *Green v. United States,* 355 U.S. 184, 189, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). If the abortive procedure below had been initiated by these four defendants, we would have no doubt about it, for it would be nonsense to allow a defendant to actively seek a mistrial and by so doing thereafter prevent any trial at all. But here the trial judge, albeit with the best of motivation, invited the motions. Indeed the tenor of the colloquy between the court and counsel suggests the possibility that the district judge might have acted *sua sponte* had there been no response to his invitation, although it appears he would have accepted an unequivocal waiver of all defendants. Apparently convinced that the trial was inextricably flawed, he not unreasonably concluded that to proceed would be an exercise in futility, with inevitable appeal and inevitable retrial. But the possibility of the award of a new trial by an appellate court and the declaration of a mistrial by a trial judge are not substantial equivalents.

[3] "More satisfactory than the limitation of manifest necessity to 'breakdown [s] in judicial machinery' may be an interpretation couched in terms of whether a verdict sustainable on appeal could have been obtained had the trial judge not terminated the proceeding when he did. If the answer is yes, reprosecution ought to be barred unless the accused himself *solicited* a mistrial." Note, Double Jeopardy: The Reprosecution Problem, 77 Harv.L.Rev. 1272, 1281 (1964) (emphasis added). We think it comes to this: a reasonable apprehension that a trial is flawed sufficiently to result in reversal and retrial is not itself sufficient "manifest necessity" to justify trial abortion.

"Should the defendant decline to waive his right not to 'run the gantlet' twice rather than impose a mistrial and thereby immunize the defendant against further prosecution the judge may prefer to let the trial run its probably reversible conclusion." *Id.* at 1279.

Whether there was "consent" to the declaration of a mistrial involves varying and entirely different fact considerations. We think the time has come to inquire into such circumstances and to reject a flat rule that mere

mouthing of the motion in open court constitutes in every case waiver of a subsequent plea in bar. It is easy to adhere to the established rule in a context where the accused himself clearly and unequivocably solicits a mistrial. He should not be advantaged by his own genuine wish to forego his option to proceed to a conclusion with the first tribunal. We also reject the opposite extreme that an appellate court might entirely disregard "consent" and thus force the trial judge to face squarely the question of whether the trial ought to continue. *Id.* at 1280.

Instead we adopt the middle ground of inquiring into the circumstances surrounding the formal entry of the motion. Certainly if a judge uses his authority to intimidate the accused into consenting (something which did not occur here) there is no real waiver. *Compare United States v. Tateo*, 377 U.S. 463, 84 S.Ct. 1587, 12 L.Ed.2d 448 (1964). But short of such judicial overreaching, it seems to us that when a motion for mistrial is invited by the court with intimation that the perceived error is fatal according to a decision called to counsels' attention by the court, and when little time has been granted to consider whether such a motion should be made, the result of freedom for some and imprisonment for others should not depend simply upon which of multiple defendants made the motion. If that is the law then we invite coin-flipping to decide who strikes out to get a man on first. Here we think the suggestion to counsel to make the motion, coupled with refusal to adequately consider other possible cures and the nature of the relatively trivial incident that triggered the abortion, destroyed any real option on the part of the defendants. It is not necessary to characterize it as "judicial overreaching." *Jorn, supra*, 400 U.S. at 485, 91 S.Ct. 547. The manifest necessity doctrine as restated in *Jorn* demands a thorough inquisition by the trial judge into all the facts and painstaking consideration of all possible cures short of trial abortion.

We do not confuse actual consent to a mistrial motion that bars the defense of double jeopardy, and " 'voluntariness' for purposes of assessing the validity of a plea of guilty." *United States v. Jorn*, 400 U.S. 470, 484-85n. 11,

91 S.Ct. at 557 (1971). *See United States v. Tateo*, 377 U.S. 463, 467, 84 S.Ct. 1587, 12 L.Ed.2d 448 (1964). The crucial difference between the two is the source from which the ultimate decision must spring. The ultimate authority at trial to abort rests with the trial judge. While a guilty plea need only be accepted, a mistrial motion must be granted. A motion for mistrial is assumed to work in favor of the defendant by opening an opportunity for another trial, while a plea of guilty obviously works to his detriment by ending matters against him altogether. Even though the degree of "voluntariness" for making a mistrial motion that extinguishes the defense of double jeopardy may therefore properly fall short of that required to make a guilty plea, it cannot be diminished unnecessarily by the final granting authority, either by pressing solicitation or by blocking other possible methods of cure so that the defendant is put to an incomplete or uninformed choice. The protection of the Fifth Amendment is not so easily avoided.

[4] The decision not to probe other possible cures and not to further investigate the facts marked the point, we think, at which the mistrial was effectively declared despite the ceremonial motions made by four defendants after the fifteen minute recess. Since there was no manifest necessity for terminating the first trial, it follows that for subsequent violations of the double jeopardy clause of the Fifth Amendment the convictions must be

Reversed.

APPENDIX B

UNITED STATES OF AMERICA, APPELLEE,

versus

BILLY DELANO WALDEN ET AL., APPELLANTS
Nos. 14974-14983.

UNITED STATES COURT OF APPEALS,
FOURTH CIRCUIT

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, AT COLUMBIA
ROBERT W. HEMPHILL, DISTRICT JUDGE

ORDER

On reconsideration *en banc*, the decision of the district court with respect to the question of double jeopardy is affirmed by an equally divided court.

The cases are remanded by the full court to the original panel for disposition of the remaining questions on appeal.

For the Court:

/s/ J. BRAXTON CRAVEN, JR.,
United States Circuit Judge.

APPENDIX C

UNITED STATES OF AMERICA, APPELLEE,

versus

BILLY DELANO WALDEN ET AL., APPELLANTS

Nos. 14974-14983.

UNITED STATES COURT OF APPEALS,
FOURTH CIRCUIT

(Decided July 20, 1972)

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, AT COLUMBIA
ROBERT W. HEMPHILL, DISTRICT JUDGE

Before, BOREMAN and BRYAN, Senior Circuit Judges, and CRAVEN, Circuit Judge.

CRAVEN, Circuit Judge:

This is a continuation of the appeal first presented and ruled on by this court in *United States v. Walden*, 448 F.2d 925 (1971). Upon rehearing of *Walden, supra, en banc*, the judgment of the district court on the question of double jeopardy was upheld by an equally divided court and the case returned to the original panel for resolution of the remaining questions presented.

We think the numerous allegations of error in the trial itself are without merit. However, we think venue as to those substantive counts of the indictment which allege unlawful bank entry in other states was improperly laid in the District of South Carolina, and therefore the defendants are entitled to a judgment of acquittal on those counts.

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[1] Eleven defendants were named in the indictment. The case of defendant Boland, named in all 13 counts, was transferred to Tennessee, where he pleaded guilty to all counts and did not appeal. Since improper venue is not a jurisdictional defect, none of Boland's convictions are affected by this decision. *See.* p. 16 *infra.*

All ten defendants[1] were indicted under 18 U.S.C. § 371 for conspiracy to commit larceny of a federally insured bank in violation of 18 U.S.C. § 2113(a), conspiracy to receive money stolen from a federally insured bank in violation of 18 U.S.C. § 2113(c) and conspiracy to transport stolen money in interstate commerce in violation of 18 U.S.C. § 2314. The remaining counts of the 13-count indictment charged various defendants with violations of 18 U.S.C. §§ 2113 (entering a bank to rob it) and 2314 (transporting money knowing it to have been stolen). In each count it was alleged that the defendants charged in that count caused, in the District of South Carolina, the prohibited act to be done. However, in counts 2, 3, 5, 6, 8, 10 and 13, the banks that the defendants were accused of entering were located in states other than South Carolina.[2] All 10 defendants were tried together on all counts of the indictment in the District of South Carolina. The jury found the defendants guilty of all charges—except defendants Ard, Matranga and White were found not guilty of conspiracy.

Article III, Section 2, paragraph 3, of the Constitution of the United States provides:

> The trial of all Crimes, except in the Cases of Impeachment shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State the Trial shall be at such Place or Places as the Congress may by Law have directed.

This provision is further amplified by the Sixth Amendment, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime

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[2] Count 9 alleged an unlawful bank entry in South Carolina. Counts 4, 7, 11 and 12 alleged the transportation of stolen money either to or from South Carolina. Venue in South Carolina is obviously proper as to these counts. *See United States v. Gillette*, 189 F.2d 449 (2d Cir. 1951).

> shall have been committed, which district shall have been previously ascertained by law. . . .[3]

There has been some debate over the precise nature of the interest which these provisions were designed to protect,[4] but it is clear that they were designed for the benefit of the accused in criminal trials. *See* 8 *Moore's Federal Practice* § 18.02[2] (2d ed. Cipes). If there is doubt as to venue the Supreme Court has indicated which way the question is to be resolved.

> Questions of venue in criminal cases . . . are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed. If an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it.

United States v. Johnson, 323 U.S. 273, 276 (1944).

In this appeal, the propriety of venue in the District of South Carolina for trial of all defendants for the crime of conspiracy to violate the laws of the United States, 18 U.S.C. § 317, is not questioned. *Hyde v. United States*, 225 U.S. 347 (1912). Nor is it questioned that venue for the trial of those defendants accused of transporting stolen money across state lines is proper in the District of South Carolina, since the proof was that the interstate transportation was either to or from South Carolina. 18 U.S.C. § 2314, *United States v. Gillette*, 189 F.2d 449 (2d Cir. 1951). However, it is the position of the government,

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[3] Rule 18 of the Federal Rules of Criminal Procedure provides nothing new, but merely implements these constitutional commands. *See* 1 Wright, *Federal Practic and Procedure*, § 301 at 583.

[4] Article III, Section 2 of the Constitution seems to have been designed solely to insure that the place of the criminal trial be in the state where the crime was committed while the Sixth Amendment was designed to insure that the jurors be chosen from that district within the state in which the crime was committed. *See* Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 Mich. L.Rev. 59 (1944) and Comment, *Multi-Venue and the Obsenity Statutes*, 115 U. Pa. L.Rev. 339, 404-14 (1967).

accepted by the district court, that notwithstanding the rather clear constitutional venue provisions and the statutory interpretation commanded by *United States v. Johnson, supra,* the venue for trial on those counts of the indictment which alleged the unlawful entry of banks located in other districts may properly be laid in the District of South Carolina. We disagree.

I

The government's first theory is that bank entry in violation of 18 U.S.C. § 2113 is a continuing offense or an offense begun in one district and completed in another so as to bring it within the ambit of 18 U.S.C. § 3237.[5] The district court's agreement with this contention was founded on the concept that a conspiracy to perform an illegal act or an accessorial act in preparation of an illegal act is the first step toward the consummation of the substantive offense and that therefore the offense is begun when and where any act in furtherance of its execution is performed. We think this analysis overlooks the legal distinction between preparation for a crime and commission of the crime itself, and is contrary to the spirit and letter of the Constitution.

As Judge Dobie has put it, "All federal crimes are statutory, and these crimes are often defined, hidden away amid pompous verbosity, in terms of a single verb. That essential verb usually contains the key to the solution of the question: In what district was the crime committed?" Dobie, *Venue in Criminal Cases in the United States District Court,* 12 Va. L. Rev. 289, 289 (1926). There are some offenses which by their very nature are such that they may be begun in one district and completed in another or completed in more than one district. Offenses which make criminality depend upon crossing state lines are among them, as well as such offenses as embezzlement and conspiracy,

[5] 18 U.S.C., § 3237 provides in part:

(a) Except as otherwise expressly provided by enactment of Congress any offense against the United States begun in one district and completed in another or committed in more than one district may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

which usually transpire over a considerable period of time. Bank robbery or unlawful entry is not such an offense.

With regard to the particular counts in question, the portion of 18 U.S.C. § 2113 charged in the indictment was the second paragraph.[6] The prohibited verb of the statutes was "enter" for the purpose of larcency. In each robbery the money was taken from the bank building itself, and all defendants in the particular count were present in the state in which the robbery took place when it took place. We think that entry into a bank to commit larcency could only take place in the state where the federally insured banks were located.

The situation here is analogous to that considered by the Supreme Court in *Travis v. United States*, 364 U.S. 631 (1961), in which the Supreme Court specifically rejected the government's argument that the crime of filing false non-Communist affidavits was begun in the district in which the defendant executed them. Noting that "Multiple venue in general requires crimes consisting of 'distinct parts' or involving 'a continuously moving act'", *Travis v. United States, supra*, at 636, the Court concluded that it was only the **filing** of false affidavits in the District of Columbia which was prohibited, not their execution in Colorado, and Congress had specifically designated the District of Columbia as the only place where the affidavits could be filed. Venue was proper, therefore, only in the District of Columbia. Likewise, here the crime proscribed by the second paragraph of 18 U.S.C. § 2113 is not the

[6] 18 U.S.C., § 2113 provides:

§ 2113. Bank robbery and incidental crimes

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or

Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined not more than $5,000.00 or imprisoned not more than twenty years, or both.

planning or the preparation to rob the bank, but the actual entry for the purpose of committing larceny. These defendants could only have done this act in the districts where the various banks were located. *See Reass v. United States*, 99 F.2d 752, 754 (4th Cir. 1938), *United States v. Bozza*, 365 F.2d 206 (2d Cir. 1966), *United States v. Sweig*, 316 F. Supp. 1148 (S.D.N.Y. 1970). To hold otherwise would require that we ignore the Constitution and its interpretation in *United States v. Johnson, supra*, and this we cannot do.

II

The government's second alternative theory of venue is said to be based upon the doctrine that an accessory may be tried where his accessorial acts took place. The district court's interpretation of this doctrine was that "if the government can substantiate its allegations, it would appear that the defendant's [sic] South Carolina based conspiratorial and/or accessorial activity[7] would have made them accessories before the fact at common law, and, consequently, venue exists in this district as a result of that activity." We disagree.

Since the enactment of 18 U.S.C. § 2,[8] making an accessory a principal, it has been settled that an accessory may be tried in the jurisdiction where the substantive offense was committed. *United States v. Gillette, supra*, at 451. Prior to the enactment of the statute, it was, of course, true, as at common law, that an accessory could be tried in the jurisdiction of his activity although the substantive offense was committed elsewhere. Taking the two propositions together, the United States urges upon us that it had

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[7] The district court seemed to equate a conspirator with an accessory. While it may be that an accessory will *a fortiori* be guilty of conspiracy with the principal, it does not follow that a conspirator is necessarily an accessory to the substantive crimes which are the objects of the conspiracy. *See generally, State v. Thompson*, 149 W. Va. 649, 142 S.E.2d 711 (1965), for a discussion of the common law distinctions between principal, aidor and abettor, and accessory.

[8] § 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

a choice of venue and could properly have tried these defendants either in the states where the banks that were unlawfully entered were located or in the State of South Carolina where the conspiracy to rob the banks was formulated. Assuming, without deciding, that conspiratorial acts within the context of this case may be equated with accessorial aces, *see* footnote 7, *supra*, we nevertheless disagree.

That an accessory operating in South Carolina may be tried with his principal at the place of unlawful bank entry in Tennessee does not establish the converse. There is no rule of law authorizing the principal to be tried with his accessory where the accessory's acts took place. *See United States v. Gillette, supra,* at 452. The government insists, however, that for purposes of venue the individual defendants charged in the substantive counts are in theory being charged as accessories operating within the State of South Carolina and not as principals in the making of unlawful entry into banks in other states. If we accept the argument, we would have, with respect to these substantive counts, the conceptual difficulty of a bank robbery or unlawful entry being perpetrated entirely by accessories in South Carolina without the assistance of principals at place of entry. Unless, of course, we accept the ancillary theory that one may be both a principal in a substantive offense and, at the same time, his own accessory in another jurisdiction.

It is, or course, possible for a person's criminal conduct to subject him to prosecution either as a principal or as an accessory. *See generally,* 22 C.J.S. *Criminal Law* § 90 at 269 and cases cited. But where all persons charged as accessories for purposes of obtaining venue at the place where the crime was planned (South Carolina) are physically present and actively engaged in unlawful entry of a bank in another jurisdiction, we think it would distort both the substantive criminal law and the law of criminal venue to allow prosecution for the substantive offense of unlawful entry at the place (South Carolina) where the crime was planned. By definition accessories cannot alone commit a crime. At least one principal is essential, and when all who allegedly participate are in fact principals there is a degree

of absurdity in proceeding against them all as accessories for purposes of choice of jurisdiction It makes sense to bring an accessory to the place of trial of his principal; it it nonsense to reverse the procedure and serves no purpose of which we are aware except to further facilitate the prosecution of conspiracy cases and to combine such a prosecution with the prosecution of substantive offenses.

We think that inherent in the evolution of the concept of accessory is the idea that the accessory and the principal are ordinarily different persons. *Morgan v. United States,* 159 F.2d 85 (10th Cir. 1947). If the accessory and principal are the same person, there would never have been an occasion to develop the rule that an accessory may be tried at the place of his accessorial acts. The reason for such a rule was the supposition that he could not be tried at the place of the substantive offense because he was not physically present at that place. We agree with the district court in *United States v. Sweig, supra,* at 1161 that "it is only the defendant who is charged solely as an accessory who may be tried where his accessorial acts took place, because that is where his noncontinuing crime was committed."

A decision by the United States to prosecute for conspiracy is not without some advantage to the government. *See Hyde v. United States,* 225 U.S. 347, 384-81 (1912), (Holmes, J., dissenting), and *Krulewitch v. United States,* 336 U.S. 440, 446-58 (1949), (Jackson, J., dissenting). To add to the advantages already existing by engrafting a forum shopping option as to substantive offenses would, we think, go too far. To repeat, venue is not mere formalism, The right to a trial before a jury of the vicinage is fundamental and such a trial ought to be held at the place of commission of the substantive offense. The Sixth Amendment may not be ignored, and we think that a dubious theory of accessoryship of the very principals who commit the substative offense or an illogical theory of continuing crime should not be allowed to undercut it.

IV

We find no merit in the other allegations of error presented. The district court did not abuse its discretion in denying severance as to those counts where venue was properly laid in the District of South Carolina, nor was it error to admit the physical evidence seized at the Cottage Grove Bank and Trust Company. In addition, the search of the Walden residence, conducted prior to *Chimel v. California,* 395 U. S. 752 (1969), was proper under the rules laid down in *United States v. Rabinowitz,* 339 U.S. 56 (1950), and *Harris v. United States,* 331 U.S. 145 (1947), as a search incident to a lawful arrest.

We think improper venue did not deprive the District Court for the District of South Carolina of jurisdiction to try any of these defendants. The general jurisdictional statute, 18 U.S.C. § 3231, provides that: "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the states, of all offenses against the laws of the United States." We agree with Professor Orfield that "whenever a defendant violates a federal criminal statute all federal district courts then have jurisdiction." Orfield, *Venue of Federal Criminal Cases,* 17 U. Pittsburgh L. Rev. 375, 381 (1956). In each count of the indictment in which venue was improperly laid, the government has simply failed to prove an essential part of its case. *United States v. Jones,* 174 F.2d 746 (7th Cir. 1949); *United States v. Gross,* 276 F.2d 816 (2d Cir. 1960). Since the government failed to prove a necessary part of its case, those defendants convicted on counts 2, 3, 5, 6, 8, 10 and 13 are entitled to reversal of convictions on those counts. The convictions of all defendants on all other counts are affirmed. The judgment of the district court is

AFFIRMED IN PART:
REVERSED IN PART.

APPENDIX D

Transcript Second Trial, 19-20

MR. SLOAN: If it please the court, we would at this point, the jury having been sworn, renew our motion for dismissal of the indictment on the ground of former jeopardy on the same ground as stated in our motion made at the omnibus hearing, and supported by the same authorities present to the court at that time.

THE COURT: On the basis of my prior consideration, and acknowledging the court recognizes that jeopardy has attached in this particular case the motion is refused. However, counsel is free to renew at any time, or to consider the motion as continuing if you so desire for the purpose of calling it to my attention at any time during the trial of the case. That goes to all defendants.

MR. MANN: If Your Honor pleases, in the case of Louis Matranga who made a previous motion, we would like to renew our motion as to double jeopardy.

THE COURT: Well, I am going to consider it as to each and every defendant. I will consider all motions as to double jeopardy as to every defendant renewed, and overruled at this time. Now, is there anything else before we retire?